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Corporal Punishment of Students - The State's Authority and Constitutional Considerations

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COMMENTS

CORPORAL PUNISHMENT OF STUDENTS—THE STATE'S AUTHORITY AND CONSTITUTIONAL CONSIDERATIONS

The existence and exercise of a teacher's authority to use corporal punishment in disciplining students has been challenged recently in both Louisiana[1] and federal courts.[2] The decisions have answered important questions but in doing so have also created new problems. This comment will examine these recent developments and posit solutions where the law is unsettled.

The In Loco Parentis Doctrine

To help parents fulfill their duty to provide guidance, training and education to their offspring, common law grants parents a privilege to use corporal punishment.[3] Likewise settled at common law is the privilege of one standing *in loco parentis* (in the shoes of a parent) to chastise a child;[4] however, some conflict exists as to the scope of the privilege. One line of cases holds that parents and teachers alike are accountable for the effects of physical punishment only if they act maliciously or inflict permanent injury;[5] another, while

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1. Roy v. Continental Ins. Co., 313 So. 2d 349 (La. App. 3d Cir.), *cert. denied*, 318 So. 2d 47 (La. 1975).

2. Ingrahm v. Wright, 525 F.2d 909 (5th Cir. 1976); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975).

3. *See, e.g.*, Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); Carpenter v. Commonwealth, 186 Va. 851, 44 S.E. 419 (1947); State v. Spiegel, 39 Wyo. 309, 270 P. 1064 (1928); RESTATEMENT (SECOND) OF TORTS § 147 (1965).

4. Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959); Harris v. State, 115 Ga. 578, 41 S.E. 983 (1902); Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); Stevens v. Fassett, 27 Me. 266 (1847); RESTATEMENT (SECOND) OF TORTS § 147(2) (1965). The privilege extends to teachers [who are considered persons *in loco parentis*]. RESTATEMENT (SECOND) OF TORTS § 147(2) (1965); 1 W. BLACKSTONE COMMENTARIES 453 (1860): "[The father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he was employed." *See, e.g.*, Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954); Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885); Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634 (1944).

5. Dean v. State, 89 Ala. 46, 8 So. 38 (1890); Boyd v. State, 88 Ala. 169, 7 So. 268 (1890); State v. Pendergrass, 19 N.C. 365, 31 Am. Dec. 416 (1837). In *Boyd* and *Dean* the court held that the test to be applied was one of reason-

giving parents the privilege to punish physically so long as their motive is not malicious, holds those *in loco parentis* to the requirement that corporal punishment be reasonable under the circumstances.[6] But the weight of authority is to the effect that neither parents[7] nor persons *in loco parentis*[8] may exceed reasonableness in the exercise of their authority to discipline a child.

The determination of reasonableness must be made on a case by case basis. While some forms of punishment will almost always be found unreasonable, such as when punishment is malicious or causes permanent injury,[9] in most cases certain factors must be considered in analyzing the reasonableness of disciplinary conduct. The factors generally articulated are the nature of the punishment, the conduct for which it is administered, the condition of the child, his susceptibility to harm, and the motive of the person inflicting the punishment.[10]

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ableness but stated that punishment was not unreasonable unless it was inflicted with malice or caused permanent injury. *Pendergrass* held punishment causing permanent injury per se immoderate, but said that any punishment producing only temporary pain, however severe, could not be unreasonable. *See also* Suits v. Glover, 260 Ala. 499, 71 So. 2d 49 (1954); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

6. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

7. *E.g.*, Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); Carpenter v. Commonwealth, 186 Va. 851, 44 S.E. 419 (1947); State v. Spiegel, 39 Wyo. 309, 270 P. 1064 (1928); RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

8. *E.g.*, Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944); Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); RESTATEMENT (SECOND) OF TORTS § 147(2) (1965).

9. *E.g.*, Drum v. Miller, 135 N.C. 204, 47 S.E. 421 (1904) (teacher threw pencil at student, striking him in eye and causing partial blindness, when student turned head due to distraction).

10. *See, e.g.*, Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954) (five "licks" given for insubordination to 8-year-old in good health was reasonable); Berry v. Arnold School Dist., 199 Ark. 1118, 137 S.W.2d 256 (1940) (whipping child 12-14 times with an edge of a piece of flooring lumber for throwing wad of paper was unreasonable); Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944) (when 10-year-old, 89 lb., third grader refused to allow teacher to hit him with strap and resisted principal, principal sat on him, held unreasonable); Roy v. Continental Ins. Co., 313 So. 2d 349 (La. App. 3d Cir.), *cert. denied*, 318 So. 2d 47 (1975) (reasonable to strike 8th grader once with paddle for fighting and calling teacher a "god-damn son-of-a-bitch," and to paddle him 3 or 4 more times when student continued to curse teacher); Johnson v. Horace Mann Mut. Ins. Co., 241 So. 2d 588 (La. App. 2d Cir. 1970) (unreasonable to hit student 7 or 8 times so that paddle broke and several more times with one of the broken pieces for an improper start in a race); Frank v. Orleans Parish

Application of a stricter level of scrutiny to punishment by non-parents[11] may be justified even when the test applied to both parents and those *in loco parentis* is reasonableness.[12] The rationale for such a distinction appears to be that natural affection, inherent in the parent-child relationship, is absent when a non-parent disciplines a child. Thus, the law presumes that a parent would not use a given degree of punishment unless it were justified under the circumstances, whereas a non-parent's motives, not subject to the same natural restraint,[13] should be more carefully examined. However, the validity or weight of such a presumption may be undermined when the frequency of child-beating cases is considered.[14] In addition, a non-parent such as a teacher, accustomed to dealing with a constant and infinite variety of misbehavior, may well be *less* likely to punish some forms of conduct.[15]

Teachers' Authority In Louisiana

Louisiana Civil Code Articles 218 and 220 were relied on in an early opinion by the Louisiana Attorney General for the proposition that a teacher may use reasonable corporal

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School Bd., 195 So. 2d 451 (La. App. 4th Cir.), *cert. denied*, 250 La. 635, 197 So. 2d 653 (1967) (excessive force found on conflicting evidence that in restraining a 4'9", 101 lb. student, a 5'8", 230 lb. teacher caused student to fall and break arm).

11. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

12. RESTATEMENT (SECOND) OF TORTS § 147 (1965), states that the test to be applied to both parents and those *in loco parentis* is reasonableness, but lists in § 150 as one of the factors used in *determining* reasonableness whether an actor is the punished child's parent.

13. *See* Lander v. Seaver, 32 Vt. 114, 121, 76 Am. Dec. 156, 164 (1859): "This parental power is little liable to abuse, for it is continually restrained by natural affection. . . . The schoolmaster has no such natural restraint. . . . He should be guided and restrained by judgement and wise discretion, and hence is responsible for their reasonable exercise."

14. In East Baton Rouge Parish alone there were an estimated 600 child beating cases referred to the Baton Rouge Child Protection Center between September, 1974 and the present. While 40% of these were false referrals, since there are many unreported cases, a better estimate of the actual number of cases is ten times the valid referrals. Telephone interview with Ms. Renee Smith, Public Information Officer, Baton Rouge Child Protection Center, in Baton Rouge, April 1, 1976.

15. However, a counter argument can be made that this lesser tendency to punish relates more to *when* certain conduct will be punished rather than how severely seriously obstreperous conduct will be handled.

punishment in disciplining a student.[16] Article 218 gives parents the right to use reasonable means to correct their child,[17] and Article 220 states that parents may "delegate a part of their authority to teachers . . . such as the power of . . . correction . . . ."[18] The Attorney General's opinion espoused the theory that parents' sending a child to school evinced an implied delegation of their authority to correct him.[19] However, a few recent Louisiana cases, such as *Johnson v. Horace Mann Insurance Co.*,[20] indicate a trend away from the implied delegation rationale. Although two cases previous to *Johnson* had refused to decide if teachers could use reasonable punishment since the punishment inflicted in those cases was unreasonable,[21] the Second Circuit in *Johnson* indicated in strong dicta that corporal punishment by teachers may not be authorized at all.[22] The court noted that the implied delegation theory arose when education was non-compulsory[23] and that it may not be applicable in a compulsory education context.[24] The court stated that Civil Code Article 220 "does not

16. 1934-36 LA. OP. ATTY. GEN. 221 (Jan. 3, 1935).

17. "An unemancipated minor can not quit the paternal house without the permission of his father and mother, who have the right to correct him, provided it be done in a reasonable manner." LA. CIV. CODE art. 218.

18. *Id.* art. 220.

19. "[I]t has been the accepted custom in all of the schools of the State . . . that the mere act of the parent in sending the child to school is implied authority to the teacher . . . to correct the child. . . ." 1934-36 LA. OP. ATTY. GEN. 221 (Jan. 3, 1935).

20. 241 So. 2d 588 (La. App. 2d Cir. 1970).

21. Houeye v. St. Helena Parish School Bd., 223 La. 966, 67 So. 2d 553 (1953); Frank v. Orleans Parish School Bd., 195 So. 2d 451 (La. App. 4th Cir.), *cert. denied*, 250 La. 635, 197 So. 2d 653 (1967).

22. "[I]t may be doubtful that Louisiana law permits public school teachers to use corporal punishment. . . ." Johnson v. Horace Mann Mut. Ins. Co., 241 So. 2d 588, 590 (La. App. 2d Cir. 1970).

23. The first statute with general statewide applicability requiring school attendance was enacted in 1922, La. Acts 1922, No. 222. The present compulsory attendance statute is LA. R.S. 17:221 (Supp. 1964).

24. LA. R.S. 17:221 (Supp. 1964) requires parents, tutors or other persons having control of children between seven and fifteen inclusive to send the child to a private or public school. While this comment does not deal with the existence or basis for authority of teachers in private schools to use corporal punishment, it seems that since the compulsory education statute requires attendance at a private school in lieu of a public school, the implied delegation theory would also be inapplicable in the private school situation. However, even though a private school could not benefit by the authorization by the state for the use of corporal punishment in public schools, since accep-

say that fathers and mothers *do* delegate the power of . . . correction . . . but that [they] *may* delegate such power."[25]

Since the punishment administered by a teacher in *Roy v. Continental Insurance Co.*[26] was reasonable, that case squarely presented to the Third Circuit Court of Appeal the question of the authority of a teacher to use reasonable physical means. Although it cited no statute explicitly authorizing use of physical punishment by teachers, the court stated that several Louisiana statutes imply that corporal punishment by a teacher is permissible;[27] additionally, the court thought that a general rule against reasonable corporal punishment as a means of enforcing prompt discipline would encourage students to flaunt a teacher's authority and undermine his ability to maintain good order.[28]

Subsequent to *Roy*, the Louisiana legislature enacted La. R.S. 17:416.1, which provides that "teachers, principals, and administrators . . . may . . . employ other reasonable disciplinary and corrective measures to maintain order in the schools."[29] While the provision does not authorize corporal punishment explicitly, it clearly appears to have been enacted in response to the *Roy* decision. Since other methods of enforcing discipline were already provided in La. R.S. 17:416,[30] in order to attribute a useful purpose to the statute the new provision should be construed to authorize teachers to employ corporal punishment.

The legislature also provided in the new provision that any teacher sued as a result of a disciplinary action is entitled

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tance of a student is discretionary, parental delegation of authority to punish could probably be made a condition of enrollment.

25. 241 So. 2d at 591.

26. 313 So. 2d 349 (La. App. 3d Cir.), *cert. denied*, 318 So. 2d 47 (La. 1975) (no error of law on the facts found).

27. The court cited LA. CIV. CODE art. 220, LA. R.S. 17:416 (1950), and LA. R.S. 14:18 (1950). LA. R.S. 17:416 (1950): "Every teacher is authorized to hold every pupil to a strict accountability for any disorderly conduct in school. . . ." LA. R.S. 14:18 (1950): "The fact that an offender's conduct is justifiable . . . shall constitute a defense to . . . any crime based on that conduct. This defense . . . can be claimed . . . (4) When the offender's conduct is reasonable discipline of minors by their parents, tutors, or teachers. . . ."

28. Roy v. Continental Ins. Co., 313 So. 2d 349, 354 (La. App. 3d Cir.), *cert. denied*, 318 So. 2d 47 (La. 1975).

29. LA. R.S. 17:416.1(a) (Supp. 1975).

30. LA. R.S. 17:416 (1950), *as amended by* La. Acts 1975, No. 216 § 1 (allows suspension and expulsion of students according to guidelines it sets out).

to a defense furnished by the school board and indemnification by the board in the event of liability, unless the teacher acts maliciously and intends bodily harm.[31] To construe the provision to mean that a teacher is protected only when the punishment he administers is reasonable would render the statute meaningless, since reasonable punishment is authorized by the statute and should result in no liability. Thus, a reasonable interpretation of § 416.1 would be that within the undefined area between reasonable conduct and malicious conduct, teachers who are in good faith but overstep the bounds of reasonableness will be protected.[32] Additionally, whenever a teacher uses corporal punishment, he "intends" bodily harm to some degree, however temporary or minor, but since the use of physical punishment is authorized, to read the exception literally as stripping a teacher of protection if he intends only slight harm would give an anomalous meaning to the provision. Therefore, only when the punishment is unreasonable and intended to cause *great* bodily harm should the teacher be unprotected.[33]

The *Roy* decision and the recent legislative enactment clearly seem to indicate that teachers' reasonable corporal punishment of students is authorized by the state itself in Louisiana. Authorization by statute is consistent with the dicta in *Johnson*, which stated that corporal punishment cannot be justified by a presumption that parents delegate to teachers their prerogative to physically punish. Since the basis of the privilege recognized in *Roy* and in the new legislative enactment is the state's interest in maintaining discipline in the schools, the authority for teachers to use corporal punishment is no longer drawn impliedly from parents' sending their children to school but rather from the state's power to sanction such methods to accomplish its interest in orderly functioning of its schools. However, it is necessary to deter-

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31. LA. R.S. 17:416.1(B) (Supp. 1975).

32. In such a gray area indemnification may violate LA. CONST. art. VII, § 14 prohibiting the donation of public funds because, in such cases, the teacher would be beyond the scope of his authority. A counter argument can be made that by authorizing indemnification, the legislature has provided that in such a situation a teacher will be *within* the course and scope of his employment.

33. Since unreasonable punishment inflicted with such an intent would be considered malicious, the terms "malicious" and "intended to cause bodily harm" apparently are used synonomously.

mine if there are any overriding constitutional considerations to prevent a state's authorizing its teachers to utilize reasonable physical discipline.

Parents' Constitutional Rights

Parents' constitutional attacks on statutes authorizing reasonable corporal punishment by teachers have been based on the existence of a parental right to be free from state interference in the upbringing and education of one's child. In *Meyer v. Nebraska*[34] the United States Supreme Court struck down as unconstitutional a statute prohibiting the teaching of foreign languages to children who had not passed the eighth grade level.[35] While recognizing the state's interest in promoting a homogeneous people and in encouraging the development of American ideals and qualities in foreign members of the population, the Court held that the Nebraska statute bore no reasonable relation to the state's interest and constituted an unreasonable interference with parents' right, protected by the fourteenth amendment, to provide for and direct the education of their children.[36] Similarly, in *Pierce v. Society of Sisters*[37] an Oregon compulsory education statute which required all children to attend public schools was declared violative of parents' right to select their children's schools, because it bore no reasonable relation to the state's interest in providing, regulating and promoting education. While the Court clearly recognized a protected parental right to direct a child's education, "long recognized at common law as essential to the orderly pursuit of happiness by free men,"[38] its use of the "reasonable relation" standard of due process to balance the state interest against this right indicated that the right was not a fundamental one.[39]

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34. 262 U.S. 390 (1923).

35. Neb. Laws 1919, ch. 249 (repealed 1933).

36. 262 U.S. at 400-03.

37. 268 U.S. 510 (1925).

38. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

39. While most rights protected by the due process clause of the fourteenth amendment are not violated by a statute affecting the right if the statute bears a "reasonable relation" to a legitimate state end, a statute affecting "fundamental" rights must further a "compelling state interest" to avoid violating due process. *See* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v.

When the Court recognized certain privacy rights as fundamental in *Griswold v. Connecticut*[40] and its progeny,[41] some argued that the more stringent "compelling state interest" standard of due process might be applied also to parents' right to direct the training of children under their control.[42] However, the Supreme Court reiterated in *Wisconsin v. Yoder*[43] that for a more stringent standard to be applied to the parental interest in controlling the upbringing of their children, the claim must be combined with another more fundamental right such as one emanating from the first amendment free exercise clause.[44] Although the non-fundamental nature of parents' right to raise their children free from state interference and the applicability of the reasonable relation test to it were upheld in the context of a challenge to corporal punishment in *Ware v. Estes*,[45] in *Glaser v. Marietta*[46] a federal district court struck down a school policy to the extent that it authorized corporal punishment despite parental objections.[47] While the court did not specify clearly what test it

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Connecticut, 381 U.S. 479 (1965); Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

40. 381 U.S. 479 (1965).

41. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

42. *Recent Decisions*, 12 DUQUESNE L. REV. 645, 651 (1974).

43. 406 U.S. 205 (1972).

44. The Court reversed a conviction for violation of a compulsory education law by Amish parents, finding that the *combined* free exercise and parental liberty claims outweighed the state interest in compulsory education. *Id.* at 233.

45. 328 F. Supp. 657, 658-59 (N.D. Tex.), *aff'd* 458 F.2d 1360 (5th Cir. 1971) (per curiam), *cert. denied*, 409 U.S. 1027 (1972): "Under the doctrine of Meyer v. Nebraska . . . the state cannot unreasonably interfere with the liberty of parents . . . to direct the upbringing and education of children under their control. These parental rights are not beyond limitation. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1943) . . . . In order for a deprivation of due process under the Fourteenth Amendment to occur, the rules and policies of the school district must bear 'no reasonable relation to some purpose within the competency of the State.' Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924)." *Accord* Sims v. Waln, 388 F. Supp. 543 (W.D. Ohio 1974).

46. 351 F. Supp. 555 (W.D. Pa. 1972).

47. Authority to use corporal punishment at common law was generally thought available regardless of the consent of the parents. RESTATEMENT (SECOND) OF TORTS § 153 (1965): "One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable

applied, language in the opinion indicated that parents' rights were considered fundamental.[48]

The nature of parents' rights to prevent corporal punishment apparently was resolved when the district court decision in *Baker v. Owen*[49] was affirmed in a memorandum opinion by the United States Supreme Court. In *Baker*, a sixth-grader was paddled in a reasonable manner, over his parents' prohibition, for violation of a rule; the district court held that the punishment did not violate the parents' constitutional right to control the nature of their children's education.[50] While noting that parents' rights in *Meyer* and *Pierce* to control the nature of their children's education were held to be within the fourteenth amendment's protection and could be considered fundamental,[51] the district court expressly refused to so consider them.[52] The court reasoned that to deem as fundamental the parents' right to decide whether corporal punishment could be used would impose a burden on the state of showing a compelling state interest in authorizing corporal punishment,[53] and recognizing that to be an almost insurmountable obstacle, held that it was not justified by the nature of the parental interest in preventing corporal punishment.[54] The decision is consistent with *Meyer* and *Pierce* because, although the statutes in those cases were struck down under a reasonable relation analysis, the nature of the rights was different from that in *Baker*, thus justifying differing results in the balancing process. The parental interests in the *Meyer* and *Pierce* decisions in controlling the substance of their children's education were, as the *Baker*

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punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes."

48. "[W]hen the regulations [allowing corporal punishment] are confronted with the flat prohibition of a particular parent and an assertion of her *fundamental* rights to raise her child in the manner in which she chooses, . . . the balancing process inherent in the *Yoder* . . . [case] becomes necessary." Glaser v. Marietta, 351 F. Supp. 555, 560 (W.D. Pa. 1972) (emphasis added).

49. 395 F. Supp. 294 (M.D.N.C. 1975) *aff'd mem.*, 423 U.S. 907 (1975).

50. In *Meyer* the right involved was the right to determine the substance of the education received by their children. In *Pierce* the parents' right of control over content (religious instruction in this case) was again involved as well as their right to select the school their children attend in order to receive the desired instruction.

51. 395 F. Supp. at 299.

52. *Id.*

53. *See* explanation in note 39, *supra.*

54. 395 F. Supp. at 299-300.

court noted, "worthy of great deference due to . . . [their] unquestioned acceptance throughout our history,"[55] whereas opposition to corporal punishment "bucks a settled tradition of countenancing such punishment when reasonable."[56] The district court also reiterated the state's interest in maintaining school discipline, recognized in the Supreme Court's decision in *Goss v. Lopez*,[57] which applied procedural due process safeguards to suspension of students, and decided that reasonable corporal punishment bears a reasonable relation to a state end that is not only legitimate, but "essential."[58]

A constitutional attack on a statute authorizing corporal punishment of students without their parents' consent was presented squarely to the *Baker* court, since they construed the statute in question to authorize corporal punishment despite parental objections.[59] The affirmance by the Supreme Court seems to resolve the issue in favor of the constitutionality of such a legislative direction. Presumably, since a state constitutionally may authorize a teacher to use corporal punishment without parental consent, its use in the absence of statutory authority or in the face of a statutory prohibition would not be unconstitutional even though it violates state law.

The Students' Constitutional Rights

Baker and the more recent Fifth Circuit case of *Ingrahm v. Wright*[60] inject confusion into the issues of the existence and nature of a student's right to be free from corporal punishment. Attacks on statutes authorizing reasonable corporal punishment as violating the eighth amendment prohibition against cruel and unusual punishment have been consistently rejected by the lower courts with indications that the amendment is inapplicable in a civil context.[61] However, since

55. *Id.* at 300.

56. *Id.*

57. 419 U.S. 565 (1975). *See also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

58. Baker v. Owen, 395 F. Supp. 294, 301 (M.D.N.C. 1975).

59. *Id.* at 298.

60. 525 F.2d 909 (5th Cir. 1976).

61. Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973); Sims v. Board of Ed., 329 F. Supp. 678 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971). *Contra*, Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974). *See also* Powell v. Texas, 392 U.S. 514 (1968).

those cases rested their holdings on the assumption that the eighth amendment, even if applicable, is not violated by authorization or use of reasonable physical punishment, they are not authority for the inapplicability per se of the amendment in a civil context.[62] When confronted with facts tending to show that the punishment was unreasonably applied, however, the Fifth Circuit directly held in *Ingrahm* that the eighth amendment is inapplicable to physical punishment in public schools.[63]

While a statute authorizing reasonable corporal punishment should not violate the eighth amendment on its face, arguably the amendment should apply to circumstances involving the use of unreasonable punishment. The dissent in *Ingrahm* points out that, although the eighth amendment was drafted in the context of criminal sanctions, it must draw its meaning from evolving standards of decency.[64] Thus, as other constitutional rights change with our concept of ordered liberty, so should the scope of the eighth amendment.[65]

As in the case of the rights of the parents to direct their child's upbringing, a statute authorizing reasonable corporal punishment is not, on its face, a violation of students' due process rights because, assuming they have a protected interest in being free from physical punishment, it is subject to the countervailing state interest in maintaining discipline in the classroom, to which such a statute bears a reasonable

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62. *But see* Sims v. Waln, 388 F. Supp. 543 (W.D. Ohio 1974) (by dismissing an eighth amendment claim for lack of a substantial federal question, a district court held the amendment inapplicable to corporal punishment in schools).

63. Ingrahm v. Wright, 525 F.2d 909, 912-15 (5th Cir. 1976).

64. *Id.* at 923 (Rives, C.J., dissenting). *E.g.*, Furman v. Georgia, 408 U.S. 238 (1972).

65. Even if the eighth amendment is held inapplicable to corporal punishment in schools, a remedy may be available under the Louisiana constitution of 1974. While similar to the eighth amendment, LA. CONST. art. I, § 20 has a broader scope. By providing that "[*n*]*o law* shall subject any person . . . to cruel, excessive, or unusual punishment," the section indicates that imposing such punishment, including corporal punishment of school children, may be prohibited. Although the argument can be made that reasonable corporal punishment, while not cruel and unusual, is "excessive," it appears that due to the countervailing state interest in maintaining school discipline, statutory authority for teachers' use of reasonable corporal punishment should not be unconstitutional. Only when the punishment is unreasonable would it be "excessive."

relation.[66] *Ingrahm* reaffirms this principle,[67] but the Fifth Circuit refused to delve into the factual circumstances to ascertain if punishment was applied unreasonably, indicating that the availability of state civil and criminal remedies was sufficient protection of students' interest in being free from unreasonable physical punishment.[69] This refusal appears inconsistent with the court's application of a reasonable relation test to determine that the statute did not deny substantive due process on its face because such an application implies the existence of some interest worthy of constitutional protection. Additionally, the district court in *Baker* clearly recognized the existence of a student's right to be free from arbitrary and unreasonable punishment[70] when it imposed procedural due process guidelines.[71] A constitutional right should be protected from applications of state law which unreasonably interfere with the right. Thus, since a teacher acting beyond his authority in administering unreasonable corporal punishment nonetheless acts under color of state law,[72] the circumstances of the punishment should be scrutinized to determine if it was reasonably related to a legitimate state interest. Presumably, unreasonable punishment would not be so related, and would be a violation of students' substantive due process right to be free from physical punishment; thus, the refusal of the court in *Ingrahm* to use this analysis is open to criticism.

The district court in *Baker* held that a student is entitled to minimal procedural safeguards to protect him from arbitrary and capricious punishment[73] and imposed specific

66. *E.g.*, Sims v. Board of Ed., 329 F. Supp. 678 (D.N.M. 1971).

67. Ingrahm v. Wright, 525 F.2d 909, 916 (5th Cir. 1976).

68. *Id.*

69. *Id.* at 915.

70. The *Baker* court found a protectible interest when it stated that "the legal system, once quite tolerant of physical punishment in many contexts, has become less so. . . . While the state historically has been granted broader powers over children than over adults . . . the Supreme Court has explicitly recognized that children have rights, too. . . . Thus, although the weight of legal authority still permits corporal punishment of public school children . . . it seems uncontrovertible that the child has a legitimate interest in avoiding unnecessary or arbitrary infliction of a punishment that probably would be completely disallowed as to an adult." Baker v. Owen, 395 F. Supp. 294, 301-02 (M.D.N.C. 1975).

71. See discussion of procedural due process in text at note 74, *infra*.

72. Ingrahm v. Wright, 525 F.2d 909, 921 (Rives, C.J., dissenting).

73. Baker v. Owen, 395 F. Supp. 294, 301-02 (M.D.N.C. 1975).

guidelines in this regard.[74] However, because the *Baker* decision was appealed only by the parents and only the parental right to prohibit corporal punishment was at issue, the applicability of procedural due process was not decided by the Supreme Court. In *Ingrahm*, the Fifth Circuit did not follow that portion of the *Baker* district court opinion[75] and refused to impose procedural due process guidelines, holding that students' right to be free from corporal punishment was not a significant constitutional right.[76]

As previously stated, this holding is inconsistent with the Fifth Circuit's earlier application in *Ingrahm* of the reasonable relation test to determine the substantive due process issue, which implied the existence of a student's right to be free from unreasonable physical punishment worthy of some constitutional protection.[77] The court distinguished corporal punishment from suspensions, to which due process has been applied in *Goss v. Lopez*,[78] as a much less serious event, not involving an exclusion from the educational process.[79] However, the severity of the deprivation should be irrelevant as long as the deprivation is not *de minimis*.[80] One plaintiff in *Ingrahm* required more than ten days rest at home following the physical punishment he received, and the same length of

74. "[E]xcept for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school, assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment. . . .

A teacher or principal must punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; the requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.

An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present." *Id.* at 302-03.

75. Ingrahm v. Wright, 525 F.2d 909, 918 (5th Cir. 1976).

76. *Id.* at 919.

77. See discussion in text beginning at note 60, *supra*.

78. 419 U.S. 565 (1975).

79. 525 F.2d at 918-19.

80. 419 U.S. at 576.

time was deemed more than a *de minimis* deprivation in the *Goss* suspensions.[81] As the dissent in *Ingrahm* points out, whether a student is excluded from the educational process due to an arbitrary suspension or an arbitrary punishment causing injury, the deprivation is the same.[82]

The *Ingrahm* court also based its refusal to impose procedural guidelines on the ground that such requirements would destroy the effectiveness of corporal punishment.[83] While the guidelines set out in *Baker* may present some practical problems,[84] the court in *Baker* accepted the argument that elaborate procedures were not appropriate, and imposed only minimal procedures similar to those in *Goss*.

Conclusions

Until the United States Supreme Court is confronted with the question of the necessity *vel non* of procedural due process safeguards prior to infliction of corporal punishment, school officials cannot be sure if the distinction between suspensions and corporal punishment drawn in *Ingrahm* will be upheld. Due to the implications of *Goss*, the Supreme Court will perhaps not follow *Ingrahm's* rationale, but instead will probably find corporal punishment as serious as suspensions and impose procedural due process requirements. For this reason, perhaps the safest course is to implement some minimal procedures until the question is decided. The resolution of the issue will be important for several reasons and may present new problems.

A finding that the distinction between suspensions and corporal punishment outlined in *Ingrahm* is correct would preclude any constitutional attack by parents or students based solely on the unreasonable use of corporal punishment;[85] however, if procedural due process is held applicable to instances of corporal punishment, the court will recognize impliedly that a student right entitled to some constitutional protection exists, and punishment unreasonably applied, even though meeting procedural due process requirements, may

81. *Id.*

82. 525 F.2d 926-29 (Rives, C.J., dissenting).

83. *Id.* at 919.

84. See discussion in text following note 77, *supra*.

85. *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

need to meet the reasonable relation test necessary to avoid denying substantive due process. In that event, since reasonable corporal punishment does not violate the eighth amendment, and protection against unreasonable punishment would be afforded by the fourteenth amendment's due process clause, the determination of the eighth amendment's applicability to corporal punishment situations becomes unnecessary.[86]

While it is presently clear that a reasonable use of corporal punishment is constitutional, if procedural due process limitations are imposed, even when reasonable corporal punishment is used, a failure to follow procedural guidelines would violate the constitution. The implementation and application of procedural due process guidelines set forth in *Baker* may present new problems, however. Particularly difficult is the requirement that:

> except for those acts of misconduct which are so antisocial or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use . . . .[87]

In what circumstances is behavior so disruptive as to shock the conscience, and who is to decide? School officials would have little to guide them until content is given to the guidelines. However, the *Goss* guidelines may offer some assistance in this regard. In *Goss* the court allowed immediate suspension when the student is a danger to others or presents an ongoing threat of disrupting the academic process.[88] A parallel can be drawn that would suggest that the same conduct justifying immediate suspension should authorize corporal punishment without forewarning.

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86. Because of the prior indications in the cases that the eighth amendment is inapplicable in a civil context, it seems more likely that the protection of a student's interest in avoiding unreasonable physical punishment would be accomplished through the use of fourteenth amendment procedural and substantive due process to preserve his right to personal privacy. *See* Powell v. Texas, 392 U.S. 514 (1968); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973); Sims v. Board of Ed., 329 F. Supp. 678 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971). *But see* Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

87. Baker v. Owen, 395 F. Supp. 294, 302 (M.D.N.C. 1975).

88. Goss v. Lopez, 419 U.S. 575, 582 (1974).

In addition, given the infinite variety of misbehavior in which students indulge, drafting meaningful rules that would be effective in controlling disruptive behavior without being so vague as to forewarn students inadequately may be difficult. In short, if procedural due process is imposed, future cases will need to give content to the guidelines.

Since the recent decisions at least assure that reasonable corporal punishment is constitutional as well as probably authorized under Louisiana law, and since the availability of constitutional grounds to attack unreasonable punishment has no bearing on state civil and criminal remedies, the questions most crucial to Louisiana school administrators and teachers have been answered. However, the uncertainty over the necessity of procedural safeguards remains a problem. As most teachers and parents will affirm readily, discipline in schools is a problem that has reached extraordinary proportions.[89] Therefore, in order to insure certainty in the methods and proper means available in the administration of corporal punishment to enforce school discipline, the Supreme Court should decide the applicability of procedural due process to corporal punishment of students at the first opportunity.

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89. A recent poll shows that parents consider discipline the number one problem in schools today. *Terror in Schools*, U.S. News & World Report, Jan., 1975, at 54. A survey by a special subcommittee of the Technical Assistance Division of the Louisiana Department of Education of the reactions of students, parents and principals to the *Baker v. Owen* decision indicates that, of those responding, the majority in all three categories are in favor of corporal punishment and support the decision. Telephone interview with Eugene Limar, Technical Assistance Division, Louisiana Department of Education, in Baton Rouge, April 1, 1976.